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In The

Supreme Court Of The United States

NEIL RANDALL, et al.
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

VERMONT REPUBLICAN STATE COMMITTEE
Petitioners

v.

WILLIAM SORRELL, et al.
Respondents-Conditional Cross Petitioners

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, CALIFORNIA, HAWAII, IOWA, KENTUCKY, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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INTEREST OF THE AMICI CURIAE

The amici curiae State of Connecticut and the States identified on the cover (the "Amici States"), by and through their attorneys general, respectfully submit this brief in support of the Respondents-Conditional Cross Petitioners and urge this Court to resolve a clear split among the Circuits as to whether, and under what circumstances, campaign expenditure limits can pass constitutional muster.

Uncertainty surrounding the constitutionality of campaign expenditure limits has arisen as a result of the conflict between the Second Circuit's ruling in the present case, which concluded that *Buckley v. Valeo*, 424 U.S. 1 (1976), did not impose a *per se* ban on campaign expenditure limits, and the Tenth Circuit's ruling in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), which reached precisely the opposite conclusion.

The Amici States have a vital interest in this case because the uncertainty in the law resulting from the conflict between the Circuits, if left unresolved, will force States and municipalities across the country to waste valuable time and resources debating and repeatedly litigating this important constitutional issue, thereby imposing significant costs on state taxpayers, diverting legislative focus from other important matters, and burdening local judicial systems, all of which could be avoided by a ruling from this Court.

Accordingly, the Amici States respectfully urge this Court to grant certiorari to clarify the vitally important constitutional question whether, and under what circumstances, campaign expenditure limitations can pass constitutional muster.

REASON FOR GRANTING THE WRIT

THE UNCERTAINTY SURROUNDING THE CONSTITUTIONALITY OF CAMPAIGN EXPENDITURE LIMITATIONS, IF NOT RESOLVED, WILL FORCE STATES TO WASTE VALUABLE RESOURCES DEBATING AND REPEATEDLY LITIGATING AN IMPORTANT CONSTITUTIONAL ISSUE THAT COULD, AND SHOULD, BE RESOLVED BY THIS COURT.

A. The Second Circuit's Ruling In The Present Case And The Tenth Circuit's Ruling In *Homans* Are In Direct Conflict.

A critical issue in the present case is the constitutionality of the expenditure limitations that are a vital component of Vermont's campaign finance reform law, Vt. Stat. Ann. tit. 17, §§ 2801 - 2883. The petitioners argued in the Second Circuit that expenditure limitations were *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976), and could never be justified. The Second Circuit, however, disagreed, pointing out that "[t]he *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress' purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits." *Landell v. Sorrell*, 382 F.3d 91, 107 (2d Cir. 2004). According to the Second Circuit, *Buckley* "did not conclude that the Constitution would *always* prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations." *Id.* at 107 (emphasis added). Instead, "[i]t simply held that based on the record before it, '[n]o governmental interest that has been suggested is sufficient to justify' the federal expenditure limits." *Id.* at 107, quoting *Buckley*, 424 U.S. at 55. Accordingly, the Second Circuit concluded that "after *Buckley*, there remains the possibility that a legislature could identify a sufficiently

strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." *Id.* at 108. Examining the record before it, the Second Circuit concluded that two interests cited by Vermont in support of its expenditure limitations – the interest in avoiding the appearance and reality of corruption and the interest in protecting the time of officeholders from the burdens of fundraising -- were, taken together, sufficiently compelling to pass constitutional muster.

Last year, the Tenth Circuit considered the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 U.S. 625 (2004), but reached precisely the opposite conclusion. As in the present case, the plaintiffs in *Homans* argued that expenditure limitations were *per se* barred by *Buckley*. Unlike the Second Circuit, however, the Tenth Circuit agreed with the plaintiffs, concluding that "under *Buckley* such restrictions cannot be supported as a matter of law." *Id.* at 914, citing *Kruse v. City of Cincinnati*, 142 F.3d 907, 915-916 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998). In the Tenth Circuit's view, all three of the interests advanced by Albuquerque in support of its expenditure limits – the interest in avoiding the appearance and reality of corruption, the interest in protecting the time of officeholders from the burdens of fundraising, and the interest in encouraging a robust debate of the issues through electoral competition – were "constitutionally incapable of justifying spending restrictions as a matter of law." *Id.* at 914-915.[1] Thus, the Tenth Circuit and the Second Circuit have reached diametrically opposed conclusions regarding the constitutionality of expenditure limitations under *Buckley*.

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[1] Although the *Homans'* majority opinion elsewhere stated: "I agree that the *Buckley* Court did not adopt a *per se* rule against spending limits, " *Homans*, 366 F.3d at 915, the majority's analysis of the issues clearly demonstrates that it rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment.

B. State And Municipal Legislatures, Encouraged And Emboldened By The Second Circuit's Ruling, Have Begun To Adopt Reform Measures That Include Expenditure Limitations.

Encouraged that the Second Circuit's ruling has opened the door to reform measures that include campaign expenditure limitations, State and municipal legislators, who would not previously have considered such reforms, have recently begun to introduce in their respective jurisdictions, or to consider introducing, campaign finance reform bills that include mandatory expenditure limitations.

In Massachusetts, for example, a bill currently under consideration incorporates mandatory spending limits modeled on those in Vermont's Act 64. H.B. 118, 184th General Court (Mass. 2005)(available at http://www.mass.gov/legis/bills/house/ht00/ht00118.htm). Specifically, the bill calls for limits on campaign expenditures for all general, special, and primary elections for state office, ranging from no more than $54,000 for candidates for the office of state representative, to no more than $3 million for candidates for the office of governor.

In North Carolina, legislators have introduced a bill that would impose mandatory expenditure limits on campaigns for the council of state and general assembly. H.B. 1533, General Assem., 2005-2006 Sess. (N.C. 2005)(available at http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1533v0.html). Rather than specify dollar amounts, the Act would limit campaign expenditures to no more than 75% of the median amount spent by candidates in the last two comparable elections for the same office. *Id.* at § 2.

And in Oregon, proposed legislation seeks to limit campaign expenditures by restricting a candidate's expenditure of his or her own funds in an election campaign. H.B. 3270, 73rd Or. Legis. Assembly, Reg. Sess.

(Or. 2005)(available at http://landru.leg.state.or.us/05reg/measures/hb3200.dir/hb3270.intro.html). Specifically, a candidate for statewide office would be prohibited from expending more than $50,000, and a candidate for any other public office would be limited to spending no more than $10,000, of his or her own funds. *Id.* at § 9.

Legislators in other States and certain municipalities are actively considering similar legislation, but have not yet introduced it. *See, e.g.*, Letter from Wisconsin Rep. Joseph Parisi to Jay Hecht, Wisconsin Common Cause, dated June 7, 2005 (Respondent-Intervenors Appendix 1).

C. If This Court Fails To Grant Certiorari, The Uncertainty In The Law Governing The Constitutionality Of Expenditure Limitations Will Force States To Waste Valuable Time And Resources Litigating The Issue Unnecessarily.

If this Court denies certiorari in the present case, and thereby fails to seize the opportunity to clarify the uncertainty in the law governing the constitutionality of campaign expenditure limitations, the case will be remanded to the District Court for an indefinite period of time during which State and local governments, faced with the split between the Circuits, will be forced to waste valuable time and resources debating and relitigating this important constitutional issue.

As noted above, legislators are looking at expenditure limitations with renewed interest following the Second Circuit's ruling in this case and are proposing legislation that incorporates such limits. To the extent that such measures are passed, the prevailing uncertainty surrounding their constitutionality will embroil States in legal challenges and appeals at considerable expense to the public fisc. Even if such measures are not passed, the time spent drafting, researching, introducing, and debating them

is valuable time that legislators could spend on other matters if they knew, for certain, whether expenditure limitations were constitutional. Without knowing, however, the legislative debates will continue and valuable state resources will be unnecessarily exhausted.

Even those States with no interest in adopting expenditure limitations stand to lose resources unnecessarily in the absence of clarification by this Court. Such a situation will result when a municipality within a State, or multiple municipalities, enact expenditure limitations for local candidates and thereby spur litigation that burdens the State's court system and administrative agencies. In *Homans*, for example, the City of Albuquerque's expenditure limitations resulted in both state and federal court challenges. *See Homans v. City of Albuquerque*, 217 F. Supp. 2d 1197, 1198-1199 (D.N.M. 2002).

To avoid this situation, certainty in the law is crucial. Only by resolving this issue now, will States be spared the inevitable burden of prolonged debate and repeated litigation that will result from the split between the Circuits. Accordingly, it is essential that this Court grant the petition to review the Second Circuit's ruling in this case and clarify this vitally important area of the law without further delay.

CONCLUSION

For all of the foregoing reasons, the Amici States respectfully request that this Court grant the petitions for writ of certiorari with regard to question 1 of the petitions in order to clarify whether, and under what circumstances, campaign expenditure limitations are constitutional.

Respectfully submitted,

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